get sole ownerships of their portions according to their undivided shares. Subdivision was not solely for the purpose of cultivation for if it were so they would have had to share the costs and expenses of developing the separate portions and shared the profits in the proportion of their undivided shares. To put any other construction on the signing on the plans and all the surrounding circumstances would be to indulge in ostrichism. That the parties understood the full import of signing the Plan K1 in the portions allotted to them, where the compensation to be paid by the allottees of the several portions is marked, the significance of signing the Plan P2 for subdivision, and then being taken to the land and shown where their respective portions were by PW2, then entering into possession of their portions and cultivating their respective portions individually without recourse to each other and without sharing the expenses incurred, and then not expecting or making demands for share of profits from each other, all indicate very clearly that all the ingredients of a binding contract were contained in the Plan signed by the parties.

The defendant, at the trial amended his defence to include a plea under section 4 of the Statute of Frauds which has been re-enacted by section 40(1) of the Law of Property Act 1925. The section reads:

"No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof is in writing, and signed by the party to be charged, or by some other person thereunto by him lawfully authorised."

The law does not specify the matters which the note or memorandum must contain. This has been left to judicial interpretation. The courts have held that the note or memorandum need not be prepared as such. Collateral oral agreements have been admitted to explain and construe the note or memorandum. The plan K1 signed by the parties which was later sent for subdivision is sufficient to bind the parties. Furthermore even if it is not sufficient to meet the requirement by Statute that the agreement must be evidenced in writing, the fact that the plaintiff has partly performed the contract in the expectation that the defendant would perform the rest of the contract provides an equitable remedy for the plaintiff and would not enable the defendant to escape from the obligations of his contract upon the strength of the Statute but the court will order specific performance of the contract. It has long been established that no court will allow the Statute of Frauds to be used as an instrument of Fraud. Hence the defence of non-compliance with the Statute of Frauds will be of no avail to the defence.

The only thing remaining to be done in the transaction between the plaintiff and the defendants is for them to sign cross transfers of their undivided shares in the respective new titles to land.

The Order of the court will therefore be:

(1) The defendants execute valid and registrable transfers of their two-eighths undivided shares in Lots No. 1285, 1286, 1288 and 1290 Mukim 14 Province Wellesley Central to the plaintiff. In the event of their failing to do so within one month of this day, the Senior Assistant Registrar do execute the said necessary transfer.

(2) That the plaintiff execute valid and registrable transfer of his six-eighths undivided shares in Lots No. 1287 and 1289 Mukim 14, Province Wellesley Central to the defendants. In the event of his failing to do so within one month of this date, the Senior Assistant Registrar do execute the said necessary transfer.

(3) Costs to be paid by the defendants to the plaintiff.

Order accordingly.

Solicitors: *Allen & Gledhill; Lim Teong Chuan.*

PUBLIC PROSECUTOR v. MAT RADI

[A.Cr.J. (Tan Chiaw Thong J.) September 1, 1981]
[Kuching — Criminal Appeal No. KG. 2 of 1981]

Criminal Law and Procedure — Corruption involving personnel of Armed Forces and Police Force — Who may prosecute — Lower court ordering discharge of accused — Criminal Procedure Code, ss. 376(i) & 377 — Federal Constitution, art. 144(3) — Prevention of Corruption Act, 1961, s. 4(b).

The prosecution appealed against the Order of the lower court discharging the accused on a charge under section 4(b) of the Prevention of Corruption Act 1961. The learned trial magistrate had repeatedly expressed the view that a Deputy Public Prosecutor should appear to conduct the prosecution. The Deputy Public Prosecutor informed the court that the matter had been considered by his predecessor and himself and it was decided that the prosecution should be conducted by a police officer. The learned magistrate expressed the view that as this particular corruption case involved personnel of the Armed Forces and Police Force, a Deputy Public Prosecutor rather than a police officer should conduct the prosecution. He concluded that since the Public Prosecutor was not interested the court had no alternative but to discharge the accused.

The question for the appellate court was whether for the reasons given by him the order of discharge made by the learned trial magistrate was supportable in law.

Held, allowing the appeal and setting aside the order of discharge: (1) the reason recorded by the learned trial magistrate for discharging the accused was not because he considered the charge to be groundless but because a Deputy Public Prosecutor had not appeared before him to conduct the prosecution. There was therefore no legal ground for making the order of discharge;

(2) whether in any particular case there should be a prosecution or whether an accused should be further prosecuted is a matter for the Public Prosecutor and it is not the function of the court to decide on the matter.

Cases referred to:-

(1) *Public Prosecutor* v. *Hettiarachigae L.S. Perera* [1977] 1 M.L.J. 12, 13.

(2) *Andrew Lai Siat* v. *Public Prosecutor* Criminal Appeal No. K18 of 1974 *(unreported).*

(3) *Public Prosecutor* v. *Karumah* [1980] 2 M.L.J. 102.

MAGISTRATE'S APPEAL.

Nik Hashim bin Nik Abdul Rahman (Deputy Public Prosecutor) for the appellant.

Chan Khoon Ted for the respondent.

Cur. Adv. Vult.

Tan Chiaw Thong J.: This is an appeal by the Public Prosecutor against the Order of the lower court discharging the accused on a charge under section 4(b) and punishable under section 4 of the Pre-

vention of Corruption Act 1961. The record of proceedings before the lower court shows that the accused first appeared before it on May 29, 1979 and, having pleaded not guilty to the said charge, there were several adjournments subsequently and it was not until January 12, 1981 that the learned trial magistrate made the order of discharge. The learned trial magistrate had repeatedly expressed the view that a Deputy Public Prosecutor should appear to conduct the prosecution. I was informed by the learned Deputy Public Prosecutor who argued this appeal that this matter had been considered by his predecessor and himself and it was decided that the prosecution should be conducted by a police officer. In the proceedings which resulted in the order of discharge being made, the learned trial magistrate, after referring to the saying that "Justice should not only be done but should manifestly be seen to be done", expressed the view that as this particular corruption case involved personnel of the Armed Forces and Police Force, a Deputy Public Prosecutor rather than a police officer should conduct the prosecution. He concluded by saying that since the Public Prosecutor was not interested the court had no alternative but to discharge the accused.

The question which arises in this appeal is whether for the reasons given by him the order of discharge made by learned trial magistrate is supportable in law.

I do not propose to deal with the grounds of appeal individually but collectively. It should be clearly understood what the respective functions of the courts and the Public Prosecutor are in the administration of justice. The courts are concerned so far as respects the administration of the law, in seeing that such administration and the dispensation of justice are legally and properly done. The courts are not concerned with the question as to whether proceedings for any particular offence should be instituted against any person. That is the function of the Public Prosecutor as laid down in Article 144(3) of the Federal Constitution, and section 376(i) of the Criminal Procedure Code which stipulates the Attorney-General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecution and proceedings under this Code. The instant appeal involves a charge concerning a seizable offence. Section 377 stipulates, *inter alia,* that a criminal prosecution for a seizable offence before a Magistrate may be conducted by the Public Prosecutor or a Deputy Public Prosecutor or by a police officer not below the rank of Inspector acting on behalf of the Public Prosecutor. Here, the prosecuting authority, having considered the views of the learned trial magistrate has decided to let a police inspector as well as an Assistant Superintendent of Police to conduct the prosecution, acting on behalf of the Public Prosecutor. As already mentioned, the learned trial magistrate ordered the discharge of the accused solely on the ground that the requirements of justice would not be met thereby, since the case involves military and police personnel. With respect, I do not see how, as a legal proposition, that can be right. The logical conclusion, based on this premise, would be that, in all cases involving military and police personnel, criminal prosecution should be conducted by a Deputy Public Prosecutor. In my view, this legal proposition has neither authority nor logic to support it. Of course, I am not saying that there may not be particular cases where such a course seems desirable, but it has not been demonstrated that that is the case here. It is clear that the circumstances under which an order of discharge may be made by the lower court are set out in the relevant provisions of the Criminal Procedure Code which are exhaustive in nature. In this connection, I would cite the following passage from the decision of Harun J., made in *Public Prosecutor* v. *Hettiarachigae L.S. Perera*[1]:

"A magistrate, however, may discharge an accused person under either section 173(g) of the Criminal Procedure Code before the close of the case for the prosecution or section 173(n) of the Criminal Procedure Code before calling upon the accused to enter upon his defence but the discharge under these provisions does not amount to an acquittal."

The question to consider here is whether the order of discharge of the learned trial magistrate may be regarded as having been made under section 173(g) of the Criminal Procedure Code, as there is no question in the circumstances of section 173(n) of that Code being applicable. Section 173(g) of the Criminal Procedure Code should be read in conjunction with section 173(f) of that Code, since the latter paragraph is mentioned in the former one. The provisions of section 173(f) are as follows: —

"(f) If, upon taking all the evidence herein before referred to, the court finds that no case against the accused has been made out which if unrebutted would warrant his conviction the court shall record an order of acquittal."

This paragraph does not apply here because no evidence had yet been recorded. Section 173(g) states:

"Nothing in paragraph (f) shall be deemed to prevent the court from discharging the accused at any previous stage of the case if for reasons to be recorded by the court it considers the charge to be groundless."

Here it is clear that the reason recorded by the learned trial magistrate for discharging the accused was not because he considers the charge to be groundless but because a Deputy Public Prosecutor had not appeared before him to conduct the prosecution. It is apparent, therefore, that this is no legal ground for making the order of discharge. On that ground alone, I consider that the order of discharge made by the trial magistrate is wrong and cannot be legally supported. In this connection, I refer to the following passage in the judgment of the learned Chief Justice in the case of *Andrew Lai Siat* v. *Public Prosecutor,*[2] where, at page 7 of the judgment, he said:

"The conduct of a prosecution is within the province of the Public Prosecutor. Until there is legislation directing that only a legally qualified officer may prosecute in a particular case, no magistrate should attempt to make any order directing that a particular case should be conducted by a Deputy Public Prosecutor."

With this passage I respectfully concur.

The learned Deputy Public Prosecutor has submitted that the fact that consent had been given for the prosecution of the respondent clearly shows that the Public Prosecutor is not disinterested in the case. Further I accept his statement from the bar that the view of the learned trial magistrate that a Deputy Public Prosecutor should conduct the prosecution had been considered by his predecessor and himself. These

matters by themselves show that the statement of the learned trial magistrate that the Public Prosecutor was not interested is unjustified.

Learned counsel for the respondent has emphasized that there had been a number of adjournments covering a period of more than one year up to the date the lower court made the order of discharge and that in the circumstances the Public Prosecutor should have taken steps to withdraw the charge against the respondent. As earlier mentioned, whether in any particular case there should be a prosecution or whether an accused person should be further prosecuted is a matter for the Public Prosecutor and it is not the function of the court to decide on the matter. The case of *Public Prosecutor* v. *Karumah*[3] cited by learned counsel for respondent does not, in my view, help the respondent. That case decided that where the prosecution asks for an adjournment to secure the attendance of prosecution witnesses in a case where the police investigation has been completed, the court should grant the adjournment applied for, and no more.

For the reasons given, the appeal is allowed. The order of discharge of the lower court is set aside and it is ordered that the accused be produced before the lower court for the case against him to continue according to law.

Appeal allowed;

Order of discharge set aside.

Solicitors: *Chan & Chan.*

PUBLIC PROSECUTOR v. LIEW SAM SEONG

[O.Cr.J. (Mohamed Azmi J.) September 3, 1981]

[Kuala Lumpur — Federal Territory Criminal Trial No. 11 of 1978]

Criminal Law and Procedure — Charge of having control of ammunition — Alleged discovery of ammunition on information given by accused — Police having prior knowledge of existence of exhibits — Circumstantial evidence insufficient to convict accused — Evidence Act (Revised 1971), s. 27 — Internal Security Act, 1960, s. 57.

Evidence — Alleged discovery of ammunition on information given by accused — Police having prior knowledge of existence of exhibits — Evidence Act (Revised 1971), s. 27.

In this case the accused was charged with the offence of having under his control ammunition. Apart from the circumstantial evidence, the prosecution relied on the information of the accused which led to the alleged discovery of the ammunition. There was evidence that the police had prior knowledge of the existence of the exhibits.

Held: (1) on the surrounding circumstances of the case and on balance of probabilities in the evidence, the police had knowledge of the existence of the incriminating exhibits at the premises before the alleged "discovery" after information said to be given by the accused. As such the provision of section 27 of the Evidence Act cannot apply, as the discovery could not be said to be the result of the information given;

(2) without the assistance of section 27 of the Act, the remaining prosecution evidence, which were entirely circumstantial, were insufficient to prove that the accused was in control of the incriminating exhibits at the material time;

(3) in this case the defence has raised more than a reasonable doubt and the accused must be acquitted.

Cases referred to:-

(1) *Sum Kum Seng* v. *Public Prosecutor* [1981] 1 M.L.J. 244.

(2) *Tai Chai Keh* v. *Public Prosecutor* [1949] M.L.J. 68.

(3) *Public Prosecutor* v. *Sihabduin bin Haji Salleh & Anor.* [1980] 2 M.L.J. 273.

(The following authorities were cited but not mentioned in judgment: *Sandra Margaret Birch* v. *Public Prosecutor* [1978] 1 M.L.J. 72; *Public Prosecutor* v. *Lee Kee Yok* (1924) 4 F.M.S.L.R. 1; *Chin Khing Siong* v. *R.* [1952] M.L.J. 74; *Ooi Hock Leong* v. *R.* [1955] M.L.J. 229; *Teo Thin Chan & Anor.* v. *Public Prosecutor* [1957] M.L.J. 184; *Tan Cheng Kooi & Anor.* v. *Public Prosecutor* [1972] 2 M.L.J. 115; *Public Prosecutor* v. *Teh Cheng Poh* [1980] 1 M.L.J. 251.)

CRIMINAL TRIAL.

Mohamed Shafee (Deputy Public Prosecutor) for the appellant.

Karpal Singh (*Ngeow Yin Ngee* with him) for the respondent.

Cur. Adv. Vult.

Mohamed Azmi J.: The accused is charged for a security offence in the following amended terms:

"That you on December 28, 1977 at about 11.45 a.m. at No. 97A Jalan 29 Oversea Union Garden, in the Federal Territory of Kuala Lumpur, being a security area as such vide P.U.(A) 148, dated May 15, 1969, without lawful excuse or authority did have under your control ammunition, to wit, 13 rounds of .25" (6.35 mm) live ammunition, and 5 home-made handgrenades (primed) and 3 home-made bombs and that you have thereby committed an offence punishable under section 57(1)(b) of the Internal Security Act, 1960 (Revised 1972)."

Briefly, the facts of the Prosecution case are that on December 18, 1977, the accused was arrested by D.S.P. Yee Chan Lam (PW8) at Jalan Cecil, Kuala Lumpur. In the wallet of the accused, D.S.P. Yee found, *inter alia*, the N.R.I.C. of the accused (Exhibit P17A) and another N.R.I.C. belonging to Eng Ah Suan (Exhibit P17B). He also found a bunch of keys in the pocket of the accused. For security reasons, D.S.P. Yee did not lodge a police report of the arrest; nor did he issue a search list in respect of the accused. Instead, the accused was handed to A.S.P. Mohd. Noor who lodged a report of the arrest, and another officer under the direction of A.S.P. Salleh bin Gomu issued a search list in respect of articles found on the accused person. On the same day at about 6.00 p.m., the accused was handed by A.S.P. Mohd. Noor to Inspector Wong Kim Meng (PW1) for interrogation. Inspector Wong interrogated the accused daily, and on the 10th day, i.e. December 28, 1977, the accused gave certain information to Inspector Wong which led to the discovery of the ammunition, home-made grenades and home-made bombs as stated in the charge, at No. 97A, Jalan 29, Oversea Union Garden, Kuala Lumpur. After the discovery, Inspector Wong drew a sketch plan of premises No. 97A (see Exhibit P3) and issued a search list which was acknowledged by the accused (see Exhibit P8). On the instruction of Inspector Wong, 16 photographs (Exhibits P2A to R) were taken at the scene by police photographer Abu bin Ahmad (PW3). The exhibits recovered from first, second and fourth rooms of premises No. 97A were taken to Brickfields Police Station, where Inspector Wong lodged a police report. The thirteen rounds of .25 ammunition (Exhibits P4 and P4B), the five home-made grenades (P6, P6A and P6B) and the three home-made bombs